UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA v. JACK CIOCCA, Defendant	Criminal No. 95-40-P-C

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

Now pending before the Court are Defendant's Motion for a New Trial (Docket No. 94), Defendant's Motion for a Hearing on Defendant's Motion for a New Trial (Docket No. 106), as well as Defendant's Motion for Recusal (Docket No. 107). All three motions stem from a common factual allegation. Specifically, Defendant contends that he is entitled to a new trial, and that this Court should recuse itself from this matter because, Defendant alleges, the Court reprimanded Defendant's trial counsel in a prior, unrelated, matter. The Court will deny the Motion for Recusal and dismiss the Motion for a New Trial as untimely.

FACTS

On October 25, 1995, following a trial before this Judge, Defendant, along with his codefendant, Harold Nelson, was convicted by a jury on two criminal counts, possession with the intent to distribute cocaine and conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846 and 18 U.S.C. § 2. (Docket Nos. 13, 44). Defendant was sentenced by this Judge on March 26, 1996. Defendant appealed his conviction to the United States Court of Appeals for the First Circuit (Docket No. 63). The

appeal was denied on February 24, 1997 (Docket No. 67). The Court of Appeals for the First Circuit issued a Mandate on March 18, 1997, affirming the conviction (Docket No. 68).[1]

At trial, Defendant was represented by John C. McBride ("McBride"). Eleven years before Defendant's trial, McBride was served with an order ("Order to Show Cause") issued by this Judge requiring him to show cause why formal disciplinary hearings should not be had based on his representation of a criminal defendant before this judicial officer. *In re McBride*, Misc. No. 84-115-P, slip op. at 1 (D. Me. April 24, 1995) (attached as Exhibit A to Government's Response to Motion for New Trial (Docket No. 101)). Following the issuance of the Order to Show Cause, this Judge played no further role in the proceedings regarding McBride's conduct.

The basis for the Order to Show Cause is spelled out in detail in then Chief District Judge Conrad K. Cyr's opinion. *Id.* In summary, in 1984 McBride was representing Guido Impemba in a criminal matter before this Judge. *Id.* at 2. While on bail awaiting trial, Impemba desired to leave Massachusetts temporarily to visit Virginia. *Id.* McBride properly filed a motion with this Court seeking permission, under the terms of his bail, for Impemba to travel to Virginia temporarily. *Id.* While that motion was still pending, McBride informed Impemba that the motion would be granted and that it was permissible for him to travel to Virginia. *Id.* Impemba did travel to Virginia and, as a result, he missed a scheduled meeting with his probation officer. *Id.* This Judge subsequently denied the motion. *Id.* At a hearing before this Judge, McBride took full responsibility for his improper behavior. *Id.* at 3. As a result of the hearing, this Judge issued the Order to Show Cause.

[1] The Mandate was issued pursuant to Fed. R. App. P. 41, on March 18, 1997. It was received and docketed by this Court on March 21, 1997. Per Fed. R. App. P. 41(c), "[t]he mandate is effective when issued." The Court concludes that the issuance date, also the date that it was docketed by the Court of Appeals for the First Circuit, is the effective date. The date the Mandate was docketed by this Court is irrelevant.

Contrary to Defendant's allegation, the record undeniably establishes that the Order to Show Cause was considered by Judge Cyr, not by this Judge. *Id.* at 1. After making findings of fact and conclusions of law, Judge Cyr reprimanded McBride on April 24, 1985. *Id.* at 7.

RECUSAL MOTION

Defendant's Motion for Recusal is inextricably connected with his Motion for New Trial. Defendant argues that he is entitled to a new trial because there was a "conflict of interest" between this Judge and Defendant's trial counsel, and that said conflict was not disclosed to the Defendant. The alleged "conflict of interest" arises from this Court's alleged discipline of McBride. Because this Court is the subject of the Motion for New Trial, Defendant argues in his Motion for Recusal, this Court should recuse itself from consideration of the Motion for a New Trial. In support of his Motion for Recusal, Defendant relies on two provisions of the United States Code. 28 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. . . .

28 U.S.C. § 455 provides, in pertinent part:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party . . . .

The Court begins by noting that Defendant has not submitted an affidavit as required by § 144. On that ground alone, the Court could properly deny Defendant's Motion for Recusal. However, in light of the serious issues raised by any motion for recusal, the Court will consider

the merits of Defendant's recusal motion despite the absence of an affidavit.[2] *See United States v. Kelley*, 712 F.2d 884, 888 (1st Cir. 1983).

It is important to note that while § 144 and § 455(b)(1) address instances of actual bias or prejudice, § 455(a) speaks to merely the appearance of bias or prejudice. In determining whether § 455(a) is implicated,

> [t]he proper test, it has been held, is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. § 455, but rather in the mind of the reasonable man.

United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976), *cert. denied*, 430 U.S. 909, 97 S. Ct. 1181, 51 L. Ed. 2d 585 (1977).

Furthermore, both § 144 and § 455(a) fall within the "extrajudicial source" doctrine. *See Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).[3] Under that doctrine, a judge need not necessarily recuse himself or herself if the source of the alleged personal bias or prejudice arises out of a judicial proceeding. For example, a judge is not required to recuse himself or herself from a criminal trial merely because the judge has previously sentenced the defendant for another crime. However the Court in *Liteky*, while holding that the doctrine applies to both § 144 and § 455(a), also pointed out that "there is not much doctrine to the doctrine." *Liteky*, 510 U.S. at 554, 114 S. Ct. at 1157. This is true because it is well recognized that the doctrine is not absolute. "[E]ven in cases in which the 'source' of

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[2] Defendant's Motion for Recusal may also be untimely. The record demonstrates that the Defendant has been aware of this alleged conflict between the Court and McBride at least since March 22, 1999, when Defendant filed his Motion for a New Trial. Yet Defendant's Motion for Recusal was not filed until December 1, 1999, more than eight months later. Again, however, the Court is willing to overlook this potential procedural misstep and consider the merits of the Motion for Recusal. *See United States v. Kelley*, 712 F.2d 884, 887-88 (1st Cir. 1983).

[3] The Court understands *Liteky* to overrule the Court of Appeals for the First Circuit's holding in *United States v. Chantal*, 902 F.2d 1018, 1021-22 (1st Cir. 1990), that the "extrajudical source" doctrine does not apply to § 455(a).

the bias or prejudice was clearly the proceedings themselves (for example, testimony introduced or an event occurring at trial which produced unsuppressible judicial animosity), the supposed doctrine would not necessarily be applied." *Liteky*, 510 U.S. at 545, 114 S. Ct. at 1152 (citing cases). Accordingly, the *Liteky* Court held that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, *or of prior proceedings*, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555, 144 S. Ct. at 1157 (emphasis added).

Turning to the facts alleged by both Defendant's Motion for Recusal and his Motion for a New Trial, the Court concludes that recusal in this instance is unnecessary.[4] First, this Court's issuance of the Order to Show Cause with respect to McBride's misconduct in the *Impemba* case over fifteen years ago, standing alone, simply does not demonstrate current actual bias or prejudice against Defendant. Because Defendant does not offer any other source of actual bias or prejudice, neither § 144 nor § 455(b)(1) requires recusal. The analysis under § 455(a), however, is necessarily more complex. As the Court of Appeals for the First Circuit instructed, under § 455(a), the test is whether a "reasonable man" would have a "reasonable doubt" about a judge's impartiality. *Cowden*, 545 F.2d at 265. Fortunately, there are additional cases that provide this Court with more specific guidance with respect to the application of § 455(a) to the case at bar.

First and foremost, the *Liteky* decision provides the Court with direct guidance in this matter. The Order to Show Cause, which is the basis of this Court's perceived bias or prejudice against Defendant, is a "judicial source." In analyzing a motion for recusal under § 455(a), facts or events from a judicial source may be the basis for recusal only if "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555,

[4] Because Defendant's Motion for Recusal contains few independent facts, but instead refers to the facts alleged in the Motion for a New Trial, and because Defendant has not filed an affidavit relative to his recusal motion, the Court must examine the facts in the Motion for a New Trial in order to effectively consider the Motion for Recusal.

144 S. Ct. at 1157. There is nothing in the record to demonstrate that this Judge currently has, or had at the time of Defendant's trial, anything remotely resembling a "deep-seated . . . antagonism" with respect to McBride or Defendant.

Additionally, the Court of Appeals for the First Circuit stated that "[e]ven a judge's mistaken judgment that an attorney is in need of sanction, like a judge's mistaken ruling on, say, a pretrial motion, would not establish prejudice or the appearance thereof." *In re Cooper*, 821 F.2d 833, 843 (1st Cir. 1987). In *Cooper*, the court held that it was not an abuse of the trial court's discretion to reject a recusal motion under § 144 and § 455(a) even though the trial judge referred to a party's attorney as a "clever manipulator who cannot be completely trusted even by his own colleagues."[5] *Id.* at 837. The *Cooper* court additionally found it was not an abuse of discretion for the trial court to deny the recusal motion and then issue an order to show cause why the codefendant's attorney should not be disciplined for what the trial judge concluded to be a "false" affidavit which represented a "scurrilous, scandalous personal attack on me and my integrity."[6] *Id.* at 842. *Cf. United States v. Kelley*, 712 F.2d 884 (1st Cir. 1983) (trial judge did not abuse discretion where trial judge had not recused despite previously authorizing wiretapping of defendant's attorney in an unrelated matter); *United States v. Cook*, 400 F.2d 877 (4th Cir. 1968) (judge who sat in disciplinary hearing that led to suspension of attorney was not disqualified from sitting in subsequent case in which same attorney represented a criminal defendant); *Honneus v. United States*, 425 F. Supp. 164 (D. Mass. 1977) (judge need not recuse from post-conviction motions when defendant's attorney had been referred for possible discipline during trial and defendant was now represented by different counsel).

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[5] The quote is taken from the trial judge's findings of fact with respect to a motion to dismiss arising out of alleged witness misconduct. *Id.* at 834-37. The attorney in question subsequently withdrew in order to testify, and the attorney who replaced him, along with the attorney for a codefendant, filed the recusal motion. *Id.*

[6] The affidavit in question was the affidavit required by § 144. *Id.* at 839.

Finally, it is important to recall that, contrary to Defendant's allegations, it was then Chief Judge Cyr, not this Judge, who reprimanded McBride. Furthermore, there is nothing to suggest that this Judge issued the Order to Show cause out of animosity towards McBride. On the contrary, a judge has a duty to report potentially improper conduct by an attorney. After issuing the Order to Show Cause, this Judge played no further role in the disciplinary matter. Additionally, the Court finds the timing of the Order to Show Cause relevant. The Order to Show Cause was issued more than ten years prior to Defendant's trial, and more than fifteen years prior to the current motions. These lengthy intervals provide more support for this Court's ultimate conclusion. The disciplinary proceedings relative to McBride in 1984-85, the only factual averment offered by Defendant, did not create in this Court a "personal bias or prejudice" against Defendant, nor do such proceedings reasonably bring this Court's impartiality into question. Accordingly, the Court will deny Defendant's Motion for Recusal.

MOTION FOR A NEW TRIAL

Before the Court will consider the merits of Defendant's Motion for a New Trial, the Court must be satisfied that the motion is timely. The Motion for New Trial is predicated on Fed. R. Crim. P. 33, which includes two distinct time requirements. It is well settled that these time limitations are jurisdictional in nature, such that if a motion brought under Fed. R. Crim. P. 33 is untimely, a court may not consider it. *U.S. v. Fontanez*, 628 F.2d 687 (1st Cir. 1980), *cert. denied*, 450 U.S. 935, 101 S. Ct. 1401 (1981). Therefore, the Court must address the threshold issue of timeliness.

The relevant portion of Fed. R. Crim. P. 33 currently reads as follows:

> A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. . . . A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

If this rule is applied to Defendant's motion, it is plainly time barred. Defendant's guilty verdict was handed down on October 25, 1995. His motion was docketed on March 22, 1999. Accordingly, Defendant's motion is neither within three years of the verdict, if "based on newly discovered evidence," nor is it within seven days of the verdict, if "based on any other grounds" as required by the current version of Fed. R. Crim. P. 33.

However, Fed. R. Crim. P. 33 was revised effective December 1, 1998. Prior to that time, the relevant portion of Fed. R. Crim. P. 33 read as follows:

> A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment. . . . A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

The Court of Appeals for the First Circuit has held that "final judgment" in the context of the previous version of Fed. R. Crim. P. 33 "dates from the termination of the appellate process." *Pelegrina v. United States*, 601 F.2d 18, 19 n.1 (1st Cir. 1979). Although the Court of Appeals for the First Circuit has not squarely addressed the issue, the majority position is that the termination of the appellate process occurs when the appellate court issues a mandate, as opposed to the date of the decision. *See United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995) (citing cases).

Although these two versions of Fed. R. Crim. P. 33 provide distinct time requirements with respect to motions predicated on newly discovered evidence, the versions are identical with respect to the seven-day time limit for motions based on any ground other than newly discovered evidence. Accordingly, if the Court finds that Defendant's Motion for a New Trial is based on newly discovered evidence, the Court must then determined which version of Fed. R. Crim. P. 33 must be applied to this motion.[7] If, on the other hand, the Court determines that this motion is

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[7] The Court notes that the amendment to Fed. R. Crim. P. 33, as well as all other amendments to the Federal Rules of Criminal Procedure that became effective on December 1, 1998, "shall govern all proceedings in criminal cases *thereafter* commenced and, insofar as just

(continued...)

"based on any other grounds" then the Court need not inquire as to which version of Fed. R. Crim. P. 33 applies, because the outcome under either version would be the same.

With the issue properly framed, the Court examines the grounds for Defendant's Motion for a New Trial. While Defendant has indicated that his motion is predicated on newly discovered evidence, the Court need not be bound by Defendant's appellation, and may properly inquire into the substantive basis for the motion. As the Court of Appeals for the First Circuit has aptly stated, "newly discovered evidence must be newly discovered evidence." *United States v. Lema*, 909 F.2d 561, 565 (1st Cir. 1990) (quoting *United States v. Ellison*, 557 F.2d 128, 133 (7th Cir. 1984)). While it may be true that this Court's Order to Show Cause with respect to McBride is "newly discovered" by Defendant, it is simply not "evidence" as that term is used in Fed. R. Crim. P. 33. This rule allows a defendant the opportunity to have a new trial where new exculpatory evidence would be offered. This Court's alleged animosity towards McBride arising out of the Order to Show Cause of 1984 is not *evidence* as the term is used in Fed. R. Crim. P. 33. It is not relevant to the issue decided at Defendant's trial – whether or not Defendant violated 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846 and 18 U.S.C. § 2. Indeed, were the Court to

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[7](...continued)
and practicable, all proceedings in criminal cases *then* pending." (emphasis added). Order of the Supreme Court of the United States Amending the Federal Rules of Criminal Procedure, April 24, 1998. Accordingly, if necessary, the Court would determine whether or not it would be "just and practicable" to apply the latest version of Fed. R. Crim. P. 33 to Defendant, as his is a criminal case pending at the time of the rule change.

While this motion is undoubtedly time barred under either time limit in the current form of the rule, there is some doubt as to whether this motion would be time barred if the previous version of Fed. R. Crim. P. 33 applied and the Court determined that the motion was based on newly discovered evidence. Under that scenario, Defendant would have two years from March 18, 1997, the Mandate date, to file his motion. Defendant's Motion for a New Trial was docketed on March 22, 1999, three days after the March 19, 1999 deadline. *See* Fed. R. Crim. P. 45(a) (in counting the two years from March 18, 1997, the day of the Mandate is not counted). However, Defendant's motion was *pro se*, and it was mailed from prison on March 19, 1999, rasing thorny issues as to whether a court should deem the motion timely in the interest of justice. *Cf. Morales-Rivera v. United States*, 184 F.3d 109 (1st Cir. 1999) (*per curiam*) (expanding the prisoner mailbox rule to cover motions under 28 U.S.C. § 2255 and § 2254, in addition to notices of appeal); *but see* Fed. R. Crim. P. 45(b)(2) (expressly proscribing the enlargement of time with respect to motions under Fed. R. Crim. P. 33). Fortunately, the Court need not enter this legal thicket, for reasons set forth in the text.

grant the motion, this alleged animosity would not be admissible because it is not relevant to the allegations in the indictment as required by Fed. R. Evid. 403.[8] Accordingly, because Defendant's Motion for a New Trial is not "based on newly discovered evidence," it is necessarily "based on any other grounds." Furthermore, because the time limit for motions "based on any other grounds" is identical in both versions of Fed. R. Crim. P. 33, the Court need not determine which version applies, as the result will be the same under either version. Therefore, the Motion for a New Trial is time barred, because it was required, under Fed. R. Crim. P. 33 to have been filed within seven days of the verdict, which it was not.

CONCLUSION

Accordingly, it is **ORDERED** that Defendant's Motion for Recusal be, and it is hereby, **DENIED**. It is further **ORDERED** that Defendant's Motion for a New Trial be, and it is hereby, **DISMISSED**. It is further **ORDERED** that Defendant's Motion for a Hearing on Defendant's Motion for New Trial is **DISMISSED** as moot.

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GENE CARTER
District Judge

Dated at Portland, Maine this 19th day of January, 2000.

[8] Any doubt on this point is resolved by the standard the Court would apply if indeed this motion were based on newly discovered evidence. Specifically, the Court of Appeals for the First Circuit has held that in order to grant a new trial under Fed. R. Crim. P. 33, the newly discovered evidence must have been (i) unknown or unavailable at the time of trial; (ii) despite due diligence; (iii) material, and (iv) likely to result in an acquittal upon retrial. *United States v. Montilla-Rivera*, 171 F.3d 37, 39-40 (1st Cir. 1999). Without addressing the first two elements of the test, the "evidence" in this motion is plainly not material, and the Court cannot conceive of a situation in which this "evidence" could result in an acquittal on retrial. Obviously this test envisions evidence that addresses the alleged criminal conduct of the defendant.